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I. INTRODUCTION

The separation of powers doctrine has traditionally been considered to be virtually irrelevant to the functioning of local government. In recent decades, however, municipal government has evolved dramatically as the increasingly popular home rule provisions in state constitutions have allowed cities to draft their own charters[1] and state legislatures have authorized a wide variety of optional governmental forms.[2] A dominant feature in many of these new forms is the strengthened position of local executive power. In accordance with this trend, a few courts have recently recognized that the separation of powers doctrine applies in the context of municipal government disputes.[3] In the case of *Martindale v. Anderson*[4] the Supreme Court of Utah carried this trend to its ultimate conclusion: the complete separation of executive and legislative powers with a blanket grant of executive power to the mayor.

This Comment will provide an overview of the judicial recognition of the separation of municipal executive and legislative powers. It will then focus on the *Martindale* decision and examine the theoretical implications of reallocating municipal powers. This Comment will then consider the practical consequences of distributing functions according to the executive-legislative distinction and, finally, will suggest some possible mechanisms for checking potential abuse of executive power in a municipal separation of powers system.

II. SEPARATION OF MUNICIPAL EXECUTIVE AND LEGISLATIVE POWERS: AN OVERVIEW

A. *Traditional View*

Courts traditionally have declared that the doctrine of separation of governmental powers is inapplicable at the local level.

1. *E.g.*, CAL. CONST. art. XI, §§ 3-6; ILL. CONST. art. VII, § 6; MICH. CONST. art. VII, § 22.

2. *E.g.*, N.J. STAT. ANN. §§ 40:69A-1 to -210 (West 1967); OKLA. STAT. ANN. tit. 11, §§ 9-101 to 12-114 (West 1978).

3. Kennedy v. Ross, 28 Cal. 2d 569, 170 P.2d 904 (1946); Municipal Court v. Patrick, 254 So. 2d 193 (Fla. 1971); Broidrick v. Lindsay, 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976).

4. 581 P.2d 1022 (Utah 1978).

In 1868, for example, the California Supreme Court in *People v. Provines*[5] held the state constitutional requirement that government be divided into separate branches did not apply to municipalities.[6] The legal rationale was that, since the state constitution itself did not create local governments (a function left up to the state legislature), the constitutional separation of powers requirement did not apply to cities.[7] The policy rationale was that separation of powers serves to prevent the abuses which might arise from an unchecked concentration of power.[8] The court reasoned that since a municipality was the creature of a superior government, the superior government provided a sufficient check on potential abuse at the lower level.[9]

In 1942, the New York Court of Appeals rejected Mayor LaGuardia's argument in *LaGuardia v. Smith*[10] that New York City's government was patterned after the federal model, with independent, coordinate branches, and denied the mayor's claim of executive immunity from a subpoena duces tecum issued by the city council.[11] As recently as 1973 the New Jersey Supreme

5. 34 Cal. 520 (1868).

6. "In short," the court held, "the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments . . . ." *Id.* at 534. *See also* Santo v. State, 2 Iowa 165, 220 (1856).

7. 34 Cal. at 534.

8. The recent appearance of the separation of powers doctrine in local government seems to be based largely on a different rationale—the need for increased efficiency. *See* Jackson v. Inman, 232 Ga. 566, 569, 207 S.E.2d 475, 478 (1974). In spite of the inefficiency inherent in a government with separated powers, this form of government may be more efficient than the traditional municipal forms since the power to make executive decisions normally resides in a single individual rather than in a group of individuals.

9. 34 Cal. at 537. The court explained:

> The mischief, however, against which [the framers of the federal and state constitutions] sought to provide, did not come from inferior or subordinate officers, but from the higher grades, in whose hands the first and leading powers of the Government were vested. So far as the former were concerned, they were sufficiently under the control of the latter. Abuse of power could not come from the former in such measure as to destroy or overthrow the liberties of the people, except by direction or connivance of the latter. To surround the latter with checks was a sufficient protection against the former.

Id.

10. 288 N.Y. 1, 41 N.E.2d 153 (1942).

11. A special investigative committee of the city council had sought a written report in the mayor's possession by serving him with a subpoena duces tecum. The mayor refused to produce the report, claiming executive immunity. The court recognized the city charter did prescribe some independent functions for the major and council, but noted that under the charter the mayor also performed certain legislative functions. The court reasoned that since the legislative and executive functions are not as well separated at the city level as they are at the national level, the mayor could not invoke executive immunity. *Id.*

Court rejected a claim that resolutions passed by the governing body of a township restructuring the police department offended the doctrine of separation of powers.[12] The New Jersey court pointed out that since the township's governing body possessed a broad statutory grant of power, and since the authority of the chief of police was merely derived from that governing body,[13] the separation of powers doctrine had no application.[14]

This general rule that separation of powers does not apply to municipalities means only that a separation between the executive and legislative functions of local government is not mandatory.[15] It does not mean that such a separation is impossible.[16] One recent case holding that the separation of powers doctrine did not apply in a local setting implied a state statute or municipal charter might specifically provide for the separation of powers.[17] In practice, however, true separation of powers has been virtually unknown at the local level until recently.

B. Emergence of New Forms of Municipal Government

During the nineteenth century, the weak-mayor form of city government predominated in the United States, although some strengthening of the mayor's powers took place by the latter part of the century.[18] The commission form emerged early in the twentieth century, followed by the emergence of the commission-manager or council-manager form.[19] All of these forms involved

12. Smith v. Township of Hazlet, 63 N.J. 523, 309 A.2d 210 (1973).

13. *Id.* This case is a good example of the traditional legal status of municipal executive departments: they operate largely on power derived from the municipal legislative body rather than directly from the state legislature.

14. *Id. See* Eggers v. Kenny, 15 N.J. 107, 104 A.2d 10 (1954).

15. Separation may be required between state courts and local legislative bodies. *E.g.*, County of Los Angeles v. Superior Court, 13 Cal. 3d 721, 532 P.2d 495, 119 Cal. Rptr. 631 (1975). This Comment deals only with the separation of local executive and legislative functions.

16. *See* Dreyer v. Illinois, 187 U.S. 71 (1902) (since the manner in which a state divides the functions of government is a matter for its own determination, a separation of powers infringement does not constitute a due process violation); 42 COLUM. L. REV. 1217, 1218 n.9 (1942).

17. Ruggeri v. City of St. Louis, 441 S.W.2d 361, 365 (Mo. 1969).

18. Boynton, *City Councils: Their Role in the Legislative System*, [1976] MUNICIPAL Y.B. 67. The weak-mayor form of municipal government is a council-mayor form "in which the mayor and the council share a range of legislative and administrative powers." *Id.* at 67.

19. *Id.* The commission form of government unifies "policy-making and policy-implementing activities in a council composed of major functional department heads who were elected to office." *Id.* The commission-manager or council-manager form has the same basic structure but also utilizes a city manager who is subordinate to the council or commission. *Id.*

extensive mingling of functions, with little or no concern for the separation of powers.

While most municipalities ultimately depend upon state government as their source of authority,[20] cities today are generally granted considerable choice concerning their particular form of government. In a majority of the states, cities have the power (in some cases even without the approval of the state legislature) to draft and amend home rule charters,[21] and in many states cities are allowed to choose from among several optional statutory forms.[22]

A new trend toward more divided governmental authority has emerged as cities have increased the power and responsibility of the mayor in order to improve administrative efficiency.[23] Consequently, the greatest separation of powers today is found in the mayor-council form of municipal government,[24] and the role of the mayor is also expanding in council-manager forms in large cities.[25]

C. *Increasing Judicial Recognition of the Separation of Municipal Powers*

An early indication that separation of municipal powers might eventually be recognized appeared in the forceful 1942 dissent by Chief Justice Lehman of the New York Court of Appeals in *LaGuardia v. Smith.*[26] The Chief Justice vigorously attacked the majority's view that the separation of powers doctrine did not

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20. *See, e.g.,* Opinion of the Justices, 276 A.2d 441, 444 (Me. 1971); *In re* Elliot, 74 Wash. 2d 600, 604, 446 P.2d 347, 351 (1968).

21. 1 C. ANTIEAU, LOCAL GOVERNMENT LAW §§ 3.00-.01, 3.05 (1978). *See, e.g.,* CAL. CONST. art. XI, §§ 3-6; ILL. CONST. art. VII, § 6; MICH. CONST. art. VII, § 22.

22. *E.g.,* N.J. STAT. ANN. §§ 40:69A-1 to -210 (West 1967); OKLA. STAT. ANN. tit. 11, §§ 9-101 to 12-114 (West 1978).

23. H. HALLMAN, G. WASHNIS, & E. CRAWFORD, ORGANIZATIONAL ISSUES OF CITY GOVERNMENT 14-15 (1973); 3 MCQUILLAN MUNICIPAL CORPORATIONS § 12.43 (3d ed. repl. 1973).

24. In 1973, the mayor-council form was used in the majority of the 32 cities with populations over 400,000. H. HALLMAN, G. WASHNIS, & E. CRAWFORD, *supra* note 23, at 5.

25. *Id.* at 4, 15; E. LEWIS, THE URBAN POLITICAL SYSTEM 87-88 (1973). One study found the mayor acts as the presiding officer of the city council or commission most often in the commission form, next most often in the council-manager form, and least often in the council-mayor form, concluding that "the difference reflects the extent to which some strong mayor cities have adopted a theory of the separation of legislative and executive powers comparable to that at the state or national level." Boynton, *supra* note 18, at 72.

The same study showed the mayor had the right to vote on all issues before the council or commission in 82% of the cities using the commission form, 72% of those with the council-manager form, and only 19% of those with the council-mayor form. A further distinguishing feature of the council-mayor form is the mayoral veto. *Id.*

26. 288 N.Y. 1, 8, 41 N.E.2d 153, 156 (1942) (Lehman, C.J., dissenting).

protect the mayor from a subpoena issuing under the authority of the city council. Where the fundamental law of any government distributes the executive, legislative, and judicial functions among different branches, he argued, it necessarily implies that the branches are to be kept separate and distinct.[27] Since the New York City Charter was to be "construed in the light of these tried traditions of American government,"[28] and since the charter conferred broad executive power on the mayor and broad legislative power on the city council,[29] he contended it is "necessarily implied in the grant of power to each a limitation that neither . . . may encroach upon the field reserved for the other."[30] Chief Justice Lehman further reasoned that these areas of exclusive power can exist even though the separation of powers is not complete[31] and argued that in the *LaGuardia* case the city council had interfered in an exclusively executive realm.[32]

The argument that the separation of powers doctrine could justify a mayor's assertion of an exclusive executive power was adopted four years later by the California Supreme Court in *Kennedy v. Ross*.[33] In that case the California court upheld the validity of a contract made by the mayor of San Francisco without the authorization of the city's board of supervisors. The court found that the framers of the San Francisco Charter had intended to create a "division or separation of powers,"[34] depriving the board of supervisors of all administrative functions.[35] Similarly, the New Jersey Supreme Court commented in 1962 that the separation of powers was the fundamental theory underlying the city manager form of government.[36]

While *Kennedy v. Ross* applied the separation of powers doctrine to recognize additional authority in the executive branch, some more recent decisions have applied the same doctrine to cut the other direction. In 1973, for example, the Supreme Court of Florida used the separation of powers rationale to proscribe the mayor's power to establish a curfew and a penalty for its viola-

27. *Id.* at 10, 41 N.E.2d at 157.
28. *Id.* at 15, 41 N.E.2d at 160.
29. *Id.* at 13, 41 N.E.2d at 159.
30. *Id.* at 12, 41 N.E.2d at 158.
31. *Id.* at 13, 41 N.E.2d at 159.
32. *Id.* at 15-16, 41 N.E.2d at 160.
33. 28 Cal. 2d 569, 170 P.2d 904 (1946).
34. *Id.* at 576, 170 P.2d at 909.
35. *Id.* at 577, 170 P.2d at 909.
36. Clifton v. Zweir, 36 N.J. 309, 177 A.2d 545 (1962).

tion.[37] In 1976 the New York Court of Appeals recognized the separation of executive and legislative powers in New York City government and held that certain executive action constituted "an impermissible exercise of legislative power vested by the New York City Charter in the city council."[38]

Courts may turn to the state and federal separation of powers models to interpret a city's governing statute or charter if the city chooses to operate under a form of government with divided powers. When the city of Atlanta recently abandoned the strong commission form of government, the Supreme Court of Georgia took occasion to comment, in dicta, that the city's charter had been "changed drastically" to handle the growing demands of a large urban area. The new charter, the court said, had established a government with a "classic separation of powers."[39] Once this analogy to the state and federal systems has been made, a court will then be faced with the question of how far to carry the analogy in resolving particular disputes.

D. Martindale v. Anderson

The recent Utah Supreme Court case of *Martindale v. Anderson*[40] is a dramatic departure from the traditional judicial view of the relationship between executive and legislative functions in municipal government. The case carries the trend of increasing executive power to its ultimate conclusion, and illustrates both the theoretical and practical implications of the full-

37. Municipal Court v. Patrick, 254 So. 2d 193 (Fla. 1971). The court interpreted the city charter to mean that all legislative power was vested in the city commission alone, a limitation which applied "as well to municipalities as it does between the Congress and the President on the national level." *Id.* at 195. Since municipal power has traditionally been centered in legislative bodies, this separation of powers language may serve only to reduce executive power. It is clear the court intended to limit executive intrusion into legislative functions ("History teaches us . . . the danger of vesting total power in a single individual . . . ." *Id.*), but it is not as clear the court would have limited legislative intrusion into executive functions. *Id.*

38. Broidrick v. Lindsay, 39 N.Y.2d 641, 646, 350 N.E.2d 595, 598, 385 N.Y.S.2d 265, 267 (1976). The mayor had issued an executive order that each bidder on city construction contracts would be required to submit an affirmative action program to ensure against discrimination in employment practices, and the deputy mayor had promulgated rules pursuant to the order requiring contractors to meet prescribed percentages of minority employment. The legislative policy prohibited discrimination but did not go so far as to mandate an affirmative action percentage program. *Id.*

39. Jackson v. Inman, 232 Ga. 566, 569, 207 S.E.2d 475, 478 (1974). Compare this language with that of the same court just three years earlier in Flanigen v. Preferred Dev. Corp., 226 Ga. 267, 174 S.E.2d 425 (1970), in which the court had stated unequivocally "[t]he separation of powers doctrine does not apply to municipal governments." *Id.* at 268, 174 S.E.2d at 426. *See* Ford v. Mayor of Brunswick, 134 Ga. 820, 68 S.E. 733 (1910).

40. 581 P.2d 1022 (Utah 1978).

scale application of the separation of powers model to a municipal setting.

1. Background of the case

The Utah Constitution provides that the state legislature shall determine the organization of municipal governments but also provides that cities may adopt home rule charters.[41] The governing power of all municipalities is derived entirely from the Utah Legislature[42] and has traditionally been lodged in a single body exercising both executive and legislative powers.[43]

In 1959 the Utah Legislature passed the first major variation from this traditional form of municipal government with the Strong Mayor Form of Government Act,[44] which authorized a form of government expressly separating the powers of the board of commissioners from those of the mayor.[45] That Act was unpopular because of technical flaws[46] and was repealed in 1975 by the Optional Forms of Municipal Government Act,[47] which itself was repealed, amended, and recodified in substantially the same form in 1977.[48] The degree to which the 1975 Act and its 1977 amendments created a separation of municipal powers became the basis of the dispute in *Martindale v. Anderson.*

In a 1975 referendum, the electorate of Logan, Utah, adopted the optional council-mayor form authorized by the Optional Forms of Municipal Government Act. When the new government became effective, disputes arose concerning the division of executive and legislative powers under the new form. Particularly at issue were the powers asserted by the mayor to acquire and transfer property without council approval, to exercise exclusive control over the approval of plans for proposed subdivisions, to trans-

41. UTAH CONST. art. XI, § 5.

42. Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234 (1923).

43. This was either a board of commissioners, a city council, or a board of trustees, depending on the classification of the municipality. UTAH CODE ANN. §§ 10-6-1 to -5 (1973) (current version at UTAH CODE ANN. §§ 10-3-101 to -104 (Supp. 1977)).

44. Ch. 20, 1959 Utah Laws 42 (repealed 1975).

45. UTAH CODE ANN. § 10-6-79 (1973) (repealed 1975). The option was available only to first and second class cities, *id.* § 10-6-76 (1973) (repealed 1975), which were those with a population of at least 60,000. *Id.* § 10-1-1 (1973) (current version at UTAH CODE ANN. § 10-2-301 (Supp. 1977)).

46. R. Lee, Optional Forms of Local Government in Utah 3 (June 1976) (unpublished report of the Utah Department of Community Affairs).

47. Ch. 33, 1975 Utah Laws 106 (current version at UTAH CODE ANN. §§ 10-3-1201 to -1228 (Supp. 1977)). This Act made the mayor-council and council-manager forms available to all municipalities regardless of their classification. *Id.*

48. UTAH CODE ANN. §§ 10-3-1201 to -1228 (Supp. 1977).

fer funds within departmental budgets, and to limit the council's access to administrative information.

In March of 1977 three members of the five-member city council brought an action for declaratory judgment against the mayor.[49] The trial court held that under the council-mayor form all executive and legislative power resided in the council, which was the city's governing body, with the mayor possessing only those powers expressly vested in him by the Act. The mayor, therefore, had no authority to exercise the powers he had claimed.[50]

The Utah Supreme Court reversed, holding the Act provided for a complete separation of executive and legislative powers in a manner patterned after the federal and state constitutions.[51] The mayor was therefore justified in buying, selling, or exchanging property and in exercising power to approve subdivision plans without council approval.[52] The supreme court affirmed the trial court's rulings on the questions of budget transfers and council access to administrative information, holding these powers to be within the legislative sphere.[53]

2. *The court's analysis*

The Utah Supreme Court rejected the argument that under the new form of government the council was the locus of all residuary power—that it possessed all governing powers except those expressly vested in the mayor by the Act.[54] Instead, the court held, the Act provided for the "complete" or "absolute" separation of executive and legislative powers between the mayor and the council with municipal governing powers residing in both.[55]

The court reasoned that the preface to the Act indicated a legislative intent to provide for an alternative to traditional forms of municipal government[56] along the same lines as the 1959 Strong Mayor Form of Government Act.[57] Support for this conclusion

49. The city attorney and city budget officer were also named as defendants. However, the trial court later dismissed the complaint against them since, as agents of the mayor, they would automatically be bound by any decision concerning mayoral authority. Martindale v. Anderson, No. 16302 (Utah 1st Dist. Ct. Oct. 20, 1977), *aff'd in part and rev'd in part*, 581 P.2d 1022 (Utah 1978).

50. *Id.*

51. Martindale v. Anderson, 581 P.2d 1022, 1024 (Utah 1978).

52. *Id.* at 1027-28.

53. *Id.* at 1029.

54. *Id.* at 1023-24.

55. *Id.* at 1024-27.

56. *Id.* at 1025.

57. UTAH CODE ANN. §§ 10-6-76 to -102 (1973) (repealed 1975).

was found in various portions of the Act: first, the Act provided that the council was to deal with the administrative affairs of the municipality " '*solely through the chief executive,*' "[58] who was designated as the mayor; second, the council was "specifically defined" as the legislative body; third, the mayor was excluded from a seat on the council; and finally, the only legislative power reserved to the mayor was a veto power that could be overridden by a vote of two-thirds of the council.[59] The court rejected the trial court's emphasis on a provision declaring the council to be the "governing body," reasoning that a reading of the entire Act in light of its legislative history and that of prior legislation in the area revealed an intention to divide the governing power.[60]

Because the action was for declaratory judgment, the court also considered the prospective effect of the 1977 amendments to the Act, even though they were not in force at the time the action was filed.[61] These modifications deleted the provision which had designated the council as the governing body, and declared that municipal government would be vested in " 'two separate, independent, and equal branches of municipal government.' "[62]

The court then considered the specific Logan City disputes in light of its general reasoning. The purchase, sale, exchange, and management of city property were found to be executive functions reserved exclusively to the mayor,[63] as was the final approval of city subdivisions when done in accordance with policies and procedures adopted by the municipal council.[64] These powers are executive rather than legislative, the court reasoned, because they are "policy *execution* powers" rather than "policy *making* powers."[65]

Justice Crockett voiced a strong dissent. Since it is a basic rule of statutory construction that powers not expressly delegated are excluded, he argued, and since cities have only those powers

58. Martindale v. Anderson, 581 P.2d 1022, 1025 (Utah 1978) (emphasis in original) (quoting Optional Forms of Municipal Government Act, ch. 33, § 19, 1975 Utah Laws 106 (current version at UTAH CODE ANN. § 10-3-1217 (Supp. 1977))).

59. *Id.* at 1025.

60. *Id.* at 1027.

61. *Id.* at 1026-27.

62. *Id.* at 1026 (quoting UTAH CODE ANN. § 10-3-1209 (Supp. 1977)).

63. *Id.* at 1027.

64. The court rejected the respondents' argument that three separate statutory provisions, UTAH CODE ANN. §§ 10-9-25, 17-21-8, 57-5-3 (1973) (requiring approval of subdivisions by the municipal "legislative" and "governing" body), applied. The intent of these provisions, the court held, was only to require approval before recordation by the appropriate authority. Since they were passed long before the new optional form was contemplated, they were not controlling. 581 P.2d at 1028.

65. 581 P.2d at 1027 (emphasis in original).

delegated to them by the state legislature, it follows that the mayor had only those powers expressly granted to him and not the additional powers he had claimed.[66] The separation of powers language in the 1977 amendments must be interpreted in view of the historical development of the doctrine, he reasoned, which reveals that all undelegated power in state government rests with the legislative branch.[67] Finally, Justice Crockett warned of the danger of abuse inherent in such a "far-reaching" grant of power to the mayor.[68]

The supreme court unanimously upheld the trial court's holding that a section of Utah's Uniform Municipal Fiscal Procedures Act[69] prohibited the mayor from transferring funds set aside for the purchase of specifically described line items without council approval. This interpretation, the court held, was consistent with the encumbrance system of that Act.[70] The supreme court also affirmed the trial judge's ruling that the council was entitled to access to all administrative records of the city pursuant to the adoption of any reasonable procedure for obtaining them.[71]

III. Implications of the Separation of Municipal Powers

A. *A New Theoretical Framework*

The primary significance of *Martindale v. Anderson* is its sweeping redefinition of the municipal power structure.[72] It recognized a form of municipal government in which executive powers are conferred directly and exclusively on the mayor by the state legislature rather than circuitously via the municipal council.[73] The impact of this theoretical framework is illustrated well by the issue of subdivision approval in *Martindale*. The mayor actually

66. *Id.* at 1030-31 (Crockett, J., dissenting).
67. *Id.* at 1030.
68. *Id.* at 1031.
69. Utah Code Ann. §§ 10-10-23 to -75 (1973).
70. 581 P.2d at 1029.
71. *Id.*
72. Counsel for the appellant described the significance of the case as follows:

> [T]he decision in this case . . . will have application far beyond Logan City, because this is the first case to reach this court and perhaps any court of final jurisdiction in this country defining powers and duties between the executive and the legislative branches in a municipality that operates under a division of powers system of government rather than under a council or commission having joint legislative and executive authority.

Brief of Appellant at 33, Martindale v. Anderson, 581 P.2d 1022 (Utah 1978).

73. Other states which presently have statutes that might be similarly interpreted include New Jersey, N.J. Stat. Ann. §§ 40:69A-31 to -48 (West 1967), and Ohio, Ohio Rev. Code Ann. §§ 705.71-.86 (Page 1976).

admitted the power of subdivision approval was vested in the council by other statutes, but argued the council had delegated the power to him by ordinance.[74] The court used an entirely different rationale, declaring subdivision approval to be an executive function directly vested in the mayor and the delegation argument to be irrelevant since the council had no executive power to delegate.[75]

1. Finding intent to create a separation of powers

The terms "governing body" and "governing authority" are commonly used in statutes of various states to refer to local legislative bodies,[76] reflecting the fact that these bodies have typically possessed both legislative and executive authority. If such language is carried over into new statutes and charters, it will create obstacles to judicial recognition of a municipal system in which executive authority is granted directly and exclusively to the mayor.

In *Martindale,* the Utah court was confronted with such a situation. A provision of the Optional Forms of Municipal Government Act specifically designated the city council as the "governing body,"[77] and counsel for the respondents argued this language preserved the traditional allocation of local powers in the new form of government.[78] The court overcame the apparent effect of this language by emphasizing another provision in the Act that, in its view, specifically defined the city council as the legislative body.[79] It also pointed to the 1977 amendments to the Act, which deleted the original "governing body" language and explicitly described "'two separate, independent, and equal branches of municipal government.'"[80] Although the court stated these amendments were being considered for their prospective effect only, it relied heavily on them as evidence that the original intent of the state legislature had been to vest the complete exec-

74. Brief of Appellant at 26-27, Martindale v. Anderson, 581 P.2d 1022 (Utah 1978).

75. 581 P.2d at 1028.

76. *E.g.*, CAL. GOV'T CODE § 5402 (West 1966); IND. CODE ANN. § 20-13-6-3 (Burns Supp. 1977); TEX. REV. CIV. STAT. ANN. art. 23(9) (Vernon 1969).

77. Ch. 33, § 11, 1975 Utah Laws 106 (current version at UTAH CODE ANN. § 10-3-1210 (Supp. 1977)).

78. Brief of Respondents at 11-12, Martindale v. Anderson, 581 P.2d 1022 (Utah 1978).

79. 581 P.2d at 1025, 1027 (construing Optional Forms of Municipal Government Act, ch. 33, § 2(2), 1975 Utah Laws 106 (repealed 1977)).

80. *Id.* at 1026 (quoting UTAH CODE ANN. § 10-3-1209 (Supp. 1977)).

utive power in the mayor.[81] Without similar manifestations of intent, courts in other states would have more difficulty overcoming traditional language to reach the same conclusion.

2. *Selecting the appropriate separation of powers model*

Federal and state separation of powers models may prove helpful in analyzing a municipal separation of powers system. However, in seeking guidance from these models courts should not overlook differences in the theoretical underpinnings of the state and federal governments[82] and simply assume, as the Utah court apparently did,[83] that either model is equally appropriate.

There is a basic theoretical flaw in an analogy between the separation of powers in municipal government and the separation of powers in state government. As the *Martindale* dissent pointed out, a state legislature derives its power directly from the people and "the residuum of any undelegated power is reposed therein."[84] In most municipal governments, by contrast, no similar residuum of power rests with the local legislature.[85] In the

81. *See* 581 P.2d at 1026-27. Further evidence that the state legislature had originally intended to give a blanket grant of executive power to the mayor in the 1975 Act may be found by making a comparison of the statutory language governing the separated powers form with the council-manager option available under the Optional Forms of Municipal Government Act. Under the council-manager form, the provision dealing with the powers of the mayor expressly states that he shall have only those powers conferred upon him by the Act. Optional Forms of Municipal Government Act, ch. 33, § 25, 1975 Utah Laws 106 (current version at UTAH CODE ANN. § 10-3-1223 (Supp. 1977)). By contrast, the provision establishing the mayor's duties under the mayor-council form contains no such express limitation.

There is language in the Optional Forms of Municipal Government Act that might support a contrary conclusion, however. One provision of the Act grants the municipal council in the council-mayor form the power to prescribe additional duties for the mayor. Ch. 33, § 21(9), 1975 Utah Laws 106 (current version at UTAH CODE ANN. § 10-3-1219(9) (Supp. 1977)). It might be argued this provision indicates the state legislature intended to leave a pool of executive power under the control of the council.

82. Wood v. Budge, 13 Utah 2d 359, 363, 374 P.2d 516, 518 (1962) (footnotes omitted):

> [The State Legislature] is significantly different . . . from the federal government, which is a government of limited powers . . . expressly granted to it by the states through the Federal Constitution; whereas, the State Legislature, having the residuum of governmental power, does not look to the State Constitution for the grant of its powers, but that Constitution only sets forth the limitations on its authority.

83. 581 P.2d at 1024.

84. *Id.* at 1030 (Crockett, J., dissenting) (citing Trade Comm. v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968), and Wood v. Budge, 13 Utah 2d 359, 374 P.2d 516 (1962)). *See, e.g.*, Opinion of the Justices, 276 A.2d 441, 444 (Me. 1971); *In re* Elliott, 74 Wash. 2d 600, 604, 446 P.2d 347, 351 (1968).

85. *E.g.*, Cobo v. O'Bryant, 116 So. 2d 233 (Fla. 1959). Some jurisdictions, on the other hand, have recognized a limited right of local self-government. *E.g.*, State v. Fox, 158 Ind. 126, 63 N.E. 19 (1902).

municipal system described in *Martindale,* for example, neither the council nor the mayor has any residual powers,[86] though each does possess a broad statutory authorization to perform, respectively, any legislative or executive functions the state legislature properly delegates to municipalities. In this respect, a better analogy for theoretical purposes might be found in the structure of the federal government since it is also a government of delegated powers.[87]

B. Allocation of Specific Municipal Functions

A statute or charter creating a municipal separation of powers system probably would not exhaustively classify executive and legislative functions, explicitly assigning each function to the appropriate branch of city government. The court in *Martindale* apparently assumed that a simple executive-legislative dichotomy provided sufficient guidance where there is no specific statutory allocation of functions.[88] However, conflicting language in preexisting statutes and the generality of the executive-legislative distinction would pose problems both for courts and municipal officers attempting to apply that formula.

1. Inconsistent language in general municipal statutes

Apart from those statutes creating specific forms of municipal government, most states have general municipal statutes which govern the operation of municipalities not operating under their own charters. These statutes often contain language indicating that the power to perform particular municipal functions is vested in the local legislative body.[89] Since these statutes do not contemplate the existence of forms of government with complete separation of executive and legislative powers, this language may not necessarily reflect an intent on the part of the state legislature to classify particular functions as legislative rather than executive.

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86. Utah adheres to the prevailing view that a municipality is only a creature of the state and cannot, by its very nature, possess any residual governmental powers. Salt Lake City v. Allred, 19 Utah 2d 254, 430 P.2d 371 (1971); Salt Lake City v. Sutter, 61 Utah 533, 216 P. 234 (1923).

87. This analogy would not be as appropriate, however, where an inherent right of local self-government is recognized, *see* note 85 *supra*, or where a home rule charter creates a greater degree of local autonomy. *E.g.* Lower Colo. River Auth. v. City of San Marcos, 523 S.W.2d 641 (Tex. 1975). In these situations an analogy to state government might be more appropriate.

88. 581 P.2d at 1027-28.

89. *E.g.*, CAL. GOV'T CODE § 34091.1 (West 1968); OKLA. STAT. ANN. tit. 11, §§ 1-102(3), 22-112 (West 1978).

In Utah, for example, various statutory provisions which confer the power to perform particular functions on municipalities refer to the "board of commissioners, city council or . . . board of trustees,"[90] the "governing body,"[91] the "legislative body,"[92] or simply to "they."[93] In light of *Martindale,* these designations confuse role definition since their literal application to the new mayor-council form is inappropriate. Each particular provision must now be scrutinized to determine whether the particular function is inherently executive or legislative.[94]

2. Generality of the executive-legislative distinction

The distinction between executive and legislative matters is too general to provide workable standards for categorizing specific municipal functions. The confusion which could result from the use of this formula alone is illustrated by the fact that the decision to rezone a specific piece of land is considered to be a legislative function in California,[95] a judicial function in Oregon,[96] and an administrative function in Utah.[97]

In *Martindale* the court failed to deal with this danger and simply assumed the policymaking versus policy-execution distinction was sufficiently definitive. It then characterized the transfer of property and the approval of subdivisions as "clearly" executive functions,[98] apparently ignoring the fact that the decision to purchase a particular tract of land or deny approval of a large development might have major policymaking implications

90. UTAH CODE ANN. § 10-7-6 (1973) (power to make contracts for public lighting).

91. *Id.* § 10-8-17 (power to control water distribution).

92. *Id.* § 10-9-4 (power to appoint a planning commission).

93. *Id.* § 10-8-14 (power to control utilities and public transportation).

94. The appellant suggested the following approach: "In short, where the general municipal laws are consistent with the council-mayor form, they are to be literally applied. Where they are not consistent they are superseded and modified to the extent of the incompatibility." Brief of Appellant at 14, Martindale v. Anderson, 581 P.2d 1022 (Utah 1978). Utah courts and municipal officers may also experience some difficulty in interpreting future general municipal statutes in light of the *Martindale* holding. Any attempt by the state legislature to confer an executive function by general statute on *all* municipal legislative bodies, including the council in the council-mayor form, would require an explicit amendment to the Optional Forms of Municipal Government Act. Otherwise, the new legislation could lose its intended effect by being confused with statutes passed prior to the Act which have no bearing on the distribution of powers in the council-mayor form.

95. Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

96. Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

97. Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

98. 581 P.2d at 1027-28.

at a local level.[99]

The *Martindale* approach, therefore, gives little guidance for the resolution of future disputes. In the absence of language in a statute or charter spelling out respective powers in careful detail, the prospect of recurring adjudication threatens to disrupt the operation of municipalities seeking to solidify the roles of the mayor and council under governments with separated powers.

3. Possible sources of clarification

One possible solution to the problems of classification might be to turn to federal or state models. While these models have value in defining the general contours of power, they may not be very useful in resolving particular disputes. Although municipal and federal governments are similar in that both are governments of delegated powers,[100] many specific municipal functions have no clear federal equivalent. On the other hand, while many of the functions performed by municipal governments have a more obvious state equivalent, state and municipal separation of powers structures are theoretically dissimilar.[101]

In *Martindale* the court apparently did not find the state and federal models dispositive. Although it described the new form of government as one "framed in the image of the federal and state systems,"[102] it classified the disposition of public property as an executive prerogative in spite of the fact that it is under the ultimate control of the legislative branch at the state and federal levels.[103]

A better source for clarifying executive and legislative roles might be found in the case law dealing with the referendum process. Because of the well-established general rule that only legislative action is subject to referendum, the courts have long dealt with the executive-legislative distinction at the municipal level in that context.[104] This approach is consistent with the holding in *Martindale* since the Utah court, as well as the courts of other

99. The court also overlooked the fact that the Act itself gives the council the power to "hold executive sessions . . . for the purpose of discussion of . . . land acquisition." Optional Forms of Municipal Government Act, ch. 33, § 13, 1975 Utah Laws 106 (current version at UTAH CODE ANN. § 10-3-1212 (Supp. 1977)).

100. *See* text accompanying notes 82-87 *supra.*

101. *See* notes 84-85 and accompanying text, *supra.*

102. 581 P.2d at 1024.

103. U.S. CONST. art. IV, § 3; UTAH CONST. art. XIX, § 2; UTAH CONST. art. XX, § 1.

104. *E.g.*, Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Keigley v. Bench, 97 Utah 69, 89 P.2d 480 (1939). *See* Note, *The Legislative/Administrative Dichotomy and the Use of Initiative and Referendum in a North Dakota Home Rule City*, 51 N.D.L. REV. 855 (1975).

states, have held that actions concerning specific pieces of property are administrative in nature and not subject to the referendum process.[105]

One other possible source of clarification is the law arising out of the commonly used discretionary function exception to the waiver of governmental immunity.[106] The distinction between planning (discretionary) and operational (nondiscretionary) functions in the governmental immunity context resembles the distinction between the policymaking and policy-execution functions described in *Martindale*.[107] However, almost no governmental act is totally nondiscretionary,[108] and the discretionary function exception applies to many functions performed by the executive branch of government.[109] Therefore, a direct application of precedent from the governmental immunity setting to the separation of powers setting would be inappropriate. Nevertheless, case law in that area considers similar issues in specific factual settings and may shed light on the problem of classification.[110]

C. *Checks on the Abuse of Executive Power*

The exact parameters of the mayor's authority in a municipal government with separated powers are as yet undefined. Indeed, the Utah court's use of the terms "absolute" and "complete"[111] seems to have given the dissenting justice in *Martindale* good reason to warn of the dangers of "wilfull [*sic*] arrogation of powers."[112] The court, however, overstated its point

105. *E.g.*, State v. Salome, 167 Kan. 766, 208 P.2d 198 (1949); Monahan v. Funk, 137 Or. 580, 3 P.2d 778 (1931); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

106. In spite of the large-scale abrogation of governmental immunity, immunity is often preserved if a basic policy decision (discretionary function) is involved. *E.g.*, 28 U.S.C. § 2680(a) (1976); CAL. GOV'T CODE § 820.2 (West 1966); UTAH CODE ANN. § 63-30-10(1) (1978).

107. *See generally* Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 950-52 (1971). The discretionary function exception was not created for the purpose of maintaining a separation of executive and legislative functions. It does, however, reflect the basic logic of the separation of powers in the sense that it represents a reluctance on the part of the judicial branch to intervene in areas committed to other branches of government. *Id.* at 946, 959.

108. *Id.* at 952.

109. *E.g.*, Dahelite v. United States, 346 U.S. 15, 37-42 (1953); Cobb v. Waddington, 154 N.J. Super. 11, 380 A.2d 1145 (1977).

110. *See generally* Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 954-69 (1970). Utah cases defining discretionary functions include Andrus v. State, 541 P.2d 1117 (Utah 1975), and Carroll v. State Rd. Comm., 27 Utah 2d 384, 496 P.2d 888 (1972).

111. 581 P.2d at 1024.

112. *Id.* at 1031 (Crockett, J., dissenting).

in using such terms since the separation of powers doctrine has never been interpreted to require that the branches of government be hermetically sealed off from each other.[113] A structural analysis of this new form of municipal government reveals several checks on executive power.

One major source of control may be found in the ultimate budgetary authority traditionally considered to repose in the legislative branch. In *Martindale,* for example, the court construed Utah's Uniform Municipal Fiscal Procedures Act[114] in such a manner as to allow the city council tight budgetary control of the mayor's expenditures. Under this ruling, the council has power to prevent virtually all unapproved expenditures through the use of specifically described line items.[115] In spite of the court's holding that the acquisition of land is an executive function, the council's careful use of this budgetary power in the future could strictly limit a mayor's ability to purchase land without its authorization. This method of control will not provide any limitation on a mayor's power to sell or exchange property, however.[116]

A second source of control rests in the general power of a legislative body to formulate rules and procedures for executive action. By exercising its power to frame these rules with precision, a city council can exercise a substantial degree of control over a mayor. In *Martindale,* the court implicitly recognized the propriety of this technique when it discussed the action the city council had taken in setting forth specific rules governing the procedures for review and approval of planned unit, interblock, and cluster developments.[117] Consequently, in spite of the court's holding that the ultimate power of subdivision approval is vested in the mayor, carefully drafted procedural rules such as these minimize any danger of mayoral abuse.

The *Martindale* court suggested a third possible limitation on executive power when it held the city council was entitled to

113. *See* Buckley v. Valeo, 421 U.S. 1, 121 (1976); LaGuardia v. Smith, 288 N.Y. 1, 8, 41 N.E.2d 153, 156 (1942) (Lehman, C.J., dissenting).

114. UTAH CODE ANN. §§ 10-10-23 to -75 (1973).

115. 581 P.2d at 1029.

116. A Utah mayor is still subject to the rule prohibiting a city from disposing of public property by gift without authority from the state legislature. Sears v. Ogden City, 533 P.2d 118 (Utah 1975).

117. 581 P.2d at 1028. The propriety of this technique is further illustrated by the fact that imprecise municipal regulations are sometimes held invalid on the theory that they result in the improper delegation of executive power. *E.g.,* City of South Euclid v. Glazer, 43 Ohio Misc. 9, 332 N.E.2d 780 (1974) (ordinance invalid for failure to provide sufficient guidance to mayor). *Accord,* Sonn v. Planning Comm., 172 Conn. 156, 374 A.2d 159 (1976).

reasonable access to all administrative records.[118] The language of the opinion gives no indication that this access might be restricted by the doctrine of executive privilege.[119] The possibility that all executive records might be available for legislative scrutiny may serve as another safeguard against executive abuse.

A fourth possible limitation on the mayor's exercise of power will arise in a system characterized as having "complete" or "absolute" separation of powers[120] if courts turn to precedent from the governmental immunity area for guidance in classifying particular functions as executive or legislative.[121] In doing so, courts might be influenced by case law in that area which emphasizes the planning nature of many acts commonly performed by executive officers.[122] As a result, courts may be more likely to see the policymaking implications of those functions and determine that those functions belong to the local legislative body rather than the mayor.

Finally, other checks on executive power might be written directly into the statute or charter creating this new form of government. For example, provisions might be drafted which would allow for legislative veto and review of certain executive actions. This approach is used in Utah's Optional Forms of Municipal Government Act, which provides that the mayor's authority to prescribe the duties of some municipal officers is subject to the council's power to do the same by ordinance.[123] In addition, provisions carefully enumerating the powers granted to each branch of government might be included as a further protection against abuse.

IV. CONCLUSION

In response to the need for greater efficiency in municipal administration, new forms of local government have emerged that allow increased executive authority and autonomy. As a result, the process of municipal administration has become less entangled with the process of municipal legislation, and the doctrine

118. 581 P.2d at 1029.

119. In this respect this form of municipal government appears to deviate from the federal model. *See* United States v. Nixon, 418 U.S. 683 (1974); Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 231 n.2.

120. Martindale v. Anderson, 581 P.2d at 1024.

121. *See* text accompanying notes 107-10, *supra*.

122. *E.g.*, Dahelite v. United States, 346 U.S. 15, 37-42 (1953); Cobb v. Waddington, 154 N.J. Super. 11, 380 A.2d 1145 (1977).

123. UTAH CODE ANN. § 10-3-1219(7) (Supp. 1977).

of separation of powers has become more relevant at a local level. The culmination of this trend is a form of government such as the one recognized in *Martindale v. Anderson,* a government expressly patterned after a classic separation of powers model.

Since such a system represents a dramatic departure from the traditional structure of local government, its adoption may create difficulties in the allocation of municipal functions and the prevention of mayoral abuse. Although *Martindale* leaves many questions unanswered, it does suggest that solutions to these problems are available and that the doctrine of separation of powers may provide a workable alternative framework for structuring municipal government.

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